

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN MAHDEE AKRAM,

Defendant-Appellant.

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UNPUBLISHED

August 31, 2010

No. 283161

Wayne Circuit Court

LC No. 07-012443-FC

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

SAAD, P.J. (*concurring in part and dissenting in part*).

Though I concur with the analysis in part II of the majority opinion on defendant's remaining issues, I respectfully dissent from the majority's holding that defendant established that he was prejudiced by his counsel's failure to present his alibi defense. Because I would hold that defendant failed to establish prejudice, I would affirm his convictions.

In *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008), our Supreme Court reiterated that, to establish prejudice, "a defendant 'must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" *Id.* at 125 n 9, quoting *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Prejudice is not presumed if counsel's conduct prevented the presentation of a defense. Rather, the defendant must show a reasonable probability that he would have been acquitted if defense counsel had presented the disputed evidence. *Id.*

The trial court did not clearly err when it found defendant's alibi witnesses incredible. Evidence at trial showed that the shooting occurred at around 5:30 p.m. Raquel Akram, defendant's sister-in-law, testified at the *Ginther* hearing that she saw defendant in the hallway outside of a visitation room at a funeral home when she walked past him to get to James Hunter, a family friend, who was on the porch of the funeral home. She indicated this took place at 5:30, and that she then walked Hunter from the porch to the visitation room and back again. She did not indicate whether she saw defendant on these other trips. She testified that she saw defendant again at about 6:00 p.m. when she walked outside to the parking lot. Hunter's testimony contradicted Raquel's testimony with respect to time. Hunter testified that he arrived at the funeral home at about 4:15 or 4:20 p.m., saw defendant in the lobby, and Hunter remained "in the lobby for a minute. Then Raquel had escorted me to the body." Further, none of the other alibi witnesses who testified at the *Ginther* hearing specifically placed defendant at the funeral home at around the time of the shooting. Rather, they indicated that they saw defendant at the

funeral home upon their arrival, and saw him in various locations of the funeral home throughout the visitation. The witnesses' testimony also varied regarding what time defendant first arrived at the funeral home. Andre Akram, defendant's brother, indicated that defendant arrived at 4:30 or 4:40 p.m., or as late as 5:10 p.m., but Kamilah Helton, Antone Webb, and Hunter testified that they saw defendant when they arrived at the funeral home around 4:00 or 4:15 p.m. Although Hunter and Webb testified that they spent time outside in the parking lot and observed defendant in the lobby inside the funeral home throughout the visitation, Raquel testified that defendant was outside "[i]n front of the funeral home" when she went to the parking lot at about 6:00 p.m. Further, Helton's testimony conflicted with Raquel's testimony regarding when Raquel arrived. Moreover, Helton's testimony differed from Andre's testimony because Helton stated that Raquel walked her up to view the casket, while Andre testified that he brought Helton up to view the casket. The trial court found the alibi witnesses' testimony incredible and "general, vague, nebulous and conclusory." In addition to their contradictory testimony, all of the *Ginther* witnesses were either relatives or friends of defendant, which is a factor that weighs on their credibility. Giving deference to the trial court's superior position to assess the demeanor of the alibi witnesses and determine their credibility, the trial court's finding with regard to their credibility was not clearly erroneous. *Dendel*, 481 Mich at 130.

In addition to the lack of credibility of the witnesses, and notwithstanding defendant's complaint that the prosecution's case rested on weak evidence, ample evidence supported defendant's convictions. As an initial matter, by its verdict, the jury found the evidence sufficient and the witnesses sufficiently credible. "[P]ositive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Further, we defer to the jury's assessment of eyewitnesses' credibility. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Lawrence Archer promptly identified defendant in the photographs the police showed him after the shooting and was "[a] hundred percent positive" that defendant was the shooter. Archer had interacted with defendant three or four times before the shooting when he bought DVDs from defendant, and he saw defendant fire three shots at the victim. The other eyewitness who testified at trial, Damia Johnson, was walking next to the victim when she saw defendant approach with a gun and shoot the victim three times. Though she could not identify defendant in the police's photographs that were shown to her after the incident, Johnson explained that defendant looked different in the photograph and she nonetheless recognized defendant at trial. Detroit Police Sergeant Kevin Hanus agreed that defendant looked different in the photograph than he did in person.

Evidence also showed that the distance from the funeral home to the site of the shooting is 5.8 miles, and half of the route is on the freeway. Archer, who witnessed the murder, testified that defendant fled the scene of the shooting in a vehicle that was waiting nearby. Thus, it is possible that, even if defendant was seen at the funeral home, he could have left for a short time to shoot the victim, and then returned.

Defendant takes issue with some of the evidence the trial court cited in support of its finding that defendant failed to show prejudice. Contrary to defendant's assertions, Johnson and Archer's testimony was consistent with the medical examiner's testimony. Johnson and Archer testified that there were a total of three gunshots and that, when defendant began shooting, the victim fell and tried to raise his hands in a defensive gesture. The medical examiner testified that the victim sustained six gunshot *wounds*, but opined that the wounds could have been made by as

few as three gunshots if the victim had held his hands up in a defensive manner. The victim also suffered an abrasion on his right elbow, which indicated a “terminal fall” to the ground. This was consistent with Johnson and Archer’s testimony.

Further, though Johnson denied that she stated at the scene that she knew who shot the victim, Leartis Tyner stated that Johnson told him after the incident that she knew the identity of the shooter and Detroit Police Officer Gordon Hampton confirmed that Tyner’s police statement reflected this. Evidence also supported the trial court’s observation that Johnson was scared to reveal the identity of the shooter. Johnson testified that she wanted to assist the police, but she and her family were scared because she had heard “stories about witnesses” and what can happen when they testify.

Defendant also contends that the trial court erred when it found that Johnson saw the shooter’s face. While Johnson stated that she was looking at the victim during the shooting and was in shock, she also testified that she saw defendant as he approached the victim; she identified defendant as the person with the gun; and, she testified that defendant looked different in the police photograph than he looked at trial or on the day of the shooting. She also realized that defendant was the shooter a week before trial, when she went over the incident in her mind and “had a vision of his face.”

Based on the evidence, defendant has not shown a reasonable probability that the outcome of his trial would have been different if defense counsel had presented his alibi witnesses. Accordingly, I would hold that he is not entitled to relief on the ground that his trial counsel was ineffective and I would affirm his convictions.

/s/ Henry William Saad